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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., appellants,
v.
ILLINOIS CENTRAL RAILROAD COMPANY ET al., appellees.

No. 40.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

This is an appeal from an order of the United States District Court for the Southern District of Mississippi (Walker, Circuit Judge, and Grubb and Holmes, District Judges) perpetually enjoining the enforcement of the order of the Interstate Commerce Commission in *Swift Lumber Company* v. *F. & G. R. R. Co.*, 61 I. C. C. 485.

The case before the Commission arose upon complaint of the Swift Lumber Company, in which it was alleged that the rates on yellow pine lumber and lumber products from Knoxo, Miss., to various destinations, most important of which were the Ohio River crossings and points beyond, were unreasonable, and

unduly prejudicial to the Lumber Company and to Knoxo as compared with rates on yellow pine lumber and lumber products from surrounding points to the same destinations. Reparation was asked as to shipments which had been made under the rates complained of, and reasonable, nondiscriminatory, and nonprejudicial rates were sought for the future. All the railroad companies participating in the traffic were made defendants.

The facts upon which the Commission's order was based were set forth in its report (Rec. 145) and are here summarized. (Reference to the map, Appendix B hereto, will be helpful.)

The only railroad which reaches Knoxo is the Fernwood & Gulf. This railroad, at the time of the hearing, extended eastwardly from Fernwood, Miss., a distance of about 32 miles. It connected with the Illinois Central Railroad at Fernwood and with the New Orleans Great Northern Railroad at Tylertown, a point 21 miles east of Fernwood. Knoxo, where the Lumber Company's mill is located, is about 6 miles east of Tylertown and about 27 miles east of Fernwood. Since the hearing, the line of the Fernwood & Gulf has been extended some 12 miles farther eastward to Columbia, Miss., passing through Foxwood, Miss., where another connection was made with the New Orleans Great Northern.

The Illinois Central and the New Orleans Great Northern are north and south lines, so-called trunk lines. The Illinois Central reaches many of the destinations involved with its own rails and other

destinations through its connections. The New Orleans Great Northern reaches the destinations through its connections.

Practically all of the yellow pine producing territory through which the Illinois Central and the New Orleans Great Northern pass lies between Jackson, Miss., and the Gulf of Mexico, some 200 miles south of Jackson. The rates on lumber and lumber products from all points in this territory on the main and branch lines of these carriers and of the Yazoo & Mississippi Valley Railroad Company, which is affiliated with the Illinois Central, are grouped or blanketed to the destinations involved, which include all important consuming points; that is to say, the rates are the same from all such points to the same destinations regardless of the distance. From Knoxo, which is well within the blanket territory and nearer the northern boundary than the southern, the rates are, generally speaking, 2 cents per 100 pounds higher than the blanket rates. To some destinations they are 2½ cents per 100 pounds higher. The distances from Knoxo to destinations are less than the distances from many points taking the blanket rates.

In the Commission's report it was said (Rec. 148):

> The distances from Knoxo to the destinations involved herein are substantially less than the distances to the same destinations from many shipping points having the blanket rates. For example, from Ponchatoula, La., a lumber-shipping point 49 miles north of

New Orleans on the main line of the Illinois Central, the distances are 26 miles greater than from Knoxo. The Illinois Central apparently has no branch lines in the blanketed territory except the short Monticello branch; but from Covington, La., the terminus of a branch of the Yazoo & Mississippi Valley connecting with the main line of the former road at Hammond, La., and with the main line of the latter at Baton Rouge, La., the distances to Memphis, Tenn., through which point most of the traffic with which we are here concerned moves, are 115 miles greater via Baton Rouge and 44 miles greater via Hammond than the corresponding distance from Knoxo. From Woodville, Miss., also on a branch of the Yazoo & Mississippi Valley, the distances are 71 miles greater than from Knoxo. From Folsom, La., a point on a branch line of the New Orleans Great Northern, the distances are 24 miles greater than from Knoxo by way of Tylertown, and 96 miles greater by way of Foxworth. The points above named, from all of which yellow-pine lumber is shipped, are in the extreme southern part of the group and the distance comparisons are given merely to show that Knoxo is well within the blanketed territory.

The Fernwood & Gulf concurs in the blanket rates from Fernwood, its junction point with the Illinois Central, and from Tylertown and Foxworth, its junction points with the New Orleans Great Northern, and participates in transportation under these rates. For example, the blanket rates apply to movements

from Foxworth via the Fernwood & Gulf to Tylertown and the New Orleans Great Northern beyond or via Fernwood and the Illinois Central beyond.

It has not been the policy of either the Illinois Central or the New Orleans Great Northern to join in group or blanket rates from points on independent lines in this territory with which they connect. As a rule, rates from points on such independent lines are higher than the blanket rates by from 1 cent to 4 cents per 100 pounds. There are eight independent short lines connecting directly with the Illinois Central and two independent short lines connecting directly with the New Orleans Great Northern. Blanket rates do not apply from points on these lines. However, both the Illinois Central and the New Orleans Great Northern join in blanket rates from points on the Mississippi Central Railroad, an east and west independent line 160 miles long, operating in this territory. But before either the Illinois Central or the New Orleans Great Northern established connections with the Mississippi Central, other north and south trunk lines had established such connections and rates had been made on the blanket basis from points on the Mississippi Central via these other trunk lines. If the Illinois Central and the New Orleans Great Northern should withdraw from the blanket rates applicable from points on the Mississippi Central, blanket rates would still remain in effect via other routes.

There are three independent short lines, the Alabama & Mississippi, the Mississippi & Western,

and the Pearl River Valley, points on which take the blanket-rate basis. Blanket rates from these points are participated in by the Illinois Central and the New Orleans Great Northern, but neither of them connects directly with any one of these short lines.

PROCEEDINGS BEFORE THE COMMISSION.

A hearing was held before an examiner for the Commission, and evidence was introduced in support of the facts recited above. The examiner prepared a proposed report, in accordance with the practice of the Commission, which was served on the parties. In the proposed report it was stated that the Commission should find that rates from Knoxo which were higher by 2 cents per 100 pounds to certain destinations and by 2½ cents per 100 pounds to certain other destinations, than the blanket rates from Fernwood and Tylertown, were not unreasonable or unjustly discriminatory or unduly prejudicial to Knoxo. (Rec. 137.)

Exceptions were taken to the examiner's report, briefs were filed, and there was oral argument on May 15, 1920, before a Division of the Commission consisting of Commissioners Hall, Daniels, and Woolley.

On April 5, 1921, the Commission issued its report through Commissioner Eastman, which was concurred in by five commissioners, with three commissioners dissenting and one commissioner not participating. Among the dissenting commissioners were Commissioners Hall and Daniels. (Rec. 151, 152, 154.)

Commissioner Woolley had ceased to be a member of the Commission. (Rec. 6.)

The Commission found that the rates from Knoxo had not been shown to be unreasonable, but that they were unduly prejudicial to the Swift Lumber Company to the extent they exceeded "the blanket basis of rates from Fernwood, Tylertown, and Foxworth."

In its report the Commission stated, among other things: (Rec. 149, 150.)

> The fundamental issue is whether carriers which have equalized rates on lumber to certain destinations from all their main-line and branch-line points, and from points on certain independent short lines as well, which are located within a producing territory of wide extent may, without being guilty of undue prejudice, refuse to extend similar blanket rates to producing points within such territory which are located on other independent short lines. No question is raised as to the propriety or desirability of the blanket already established, but on the contrary it seems to be conceded that it is of general advantage to producers, consumers, and carriers alike. The sole question is whether defendants were and are justified in refusing to extend its benefit to these other short-line points and specifically in this case, to Knoxo on the line of the Fernwood & Gulf.
>
> Clearly cost of service furnishes no justification for such refusal, for the haul from Knoxo is shorter than the hauls from numerous other

points to which the blanket rates apply, and there is no evidence that it is attended by unusual transportation difficulties. As compared with a single-line haul, some slight additional cost is doubtless involved in the separate corporate organization of the Fernwood & Gulf and in its separate billing and accounting expense, but the blanket rates are not now confined to single-line hauls, but apply in many instances to multiple-line routes. Nor will competition serve as a justification, for the blanket rates apply not only at junction points where competition exists, but as well at all local points on both the main lines and branch lines of defendants.

* * * * *

Perhaps the most important suggestion is that if the blanket rates are extended to Knoxo it will follow as a necessary consequence that they must be extended to all similar points on other independent short lines, and that the revenues of the trunk lines will thereby be reduced materially. But the protection of revenue goes primarily to the issue of reasonableness and is not sufficient justification for a prejudicial rate adjustment. In the yellow-pine territory west of the Mississippi similar blanket rates have been uniformly extended to all points.

The Commission ordered that defendants, "according as they may participate in the transportation," cease and desist from publishing rates from Knoxo to the destinations involved in excess of rates contemporaneously published from Fernwood, Tyler-

town, and Foxworth, and ordered, further, that defendants establish rates from Knoxo for the future no higher than the rates contemporaneously in effect from Fernwood, Tylertown, and Foxworth.

The language of the order is in part as follows (Rec. 157):

> *It is ordered*, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 5, 1921, and thereafter to abstain, from publishing, demanding, or collecting any rates for the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Knoxo, Miss., to the Ohio River crossings, to destinations in Wisconsin, Minnesota, Iowa, and Missouri, to destinations in central and eastern trunk line territories, and to destinations in Tennessee and Kentucky, the rates to which are blanketed from yellow-pine producing points on the Illinois Central and New Orleans Great Northern railroads south of Jackson, Miss., in excess of the rates contemporaneously published, demanded, or collected by them for the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Fernwood, Tylertown, and Foxworth, Miss., to the same destinations.
>
> *It is further ordered*, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 5, 1921, upon notice to this Commission and

to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Knoxo, Miss., to the destinations described in the next preceding paragraph, rates not in excess of the rates contemporaneously maintained and applied by them to the transportation of yellow-pine lumber, timber, and lumber products, in carloads, from Fernwood, Tylertown, and Foxworth, Miss., to the same destinations.

PROCEEDINGS IN THE DISTRICT COURT.

The Illinois Central Railroad Company and the Fernwood & Gulf Railroad Company filed a bill in the United States District Court for the Southern District of Mississippi (Rec. 1), seeking to enjoin the enforcement of the Commission's order and alleging grounds which may be summarized as follows:

1. The procedure before the Commission was irregular. In this connection it was alleged that on April 5, 1921, when the Commission's report concurred in by five Commissioners was issued, the Commission was composed of eleven members.

2. The Commission was without jurisdiction to make the order on complaint of the Swift Lumber Company because that company was estopped from complaining of the rates from Knoxo by a contract which it had entered into with the Fernwood Lumber Company, predecessor in interest to the Fernwood & Gulf Railroad Company.

3. The order, in its application to the Fernwood & Gulf Railroad, would result in confiscatory rates.

4. The requirement of the order that blanket rates be published from Knoxo is contrary to the established policy of the Illinois Central and the Fernwood & Gulf.

5. There is no evidence to support the Commission's order. This fifth ground relates only to the ultimate finding by the Commission of undue prejudice. There is no dispute as to the facts. The contention is merely that these facts do not constitute undue prejudice.

The United States filed a motion to dismiss the bill. The Commission intervened and filed an answer which included a denial that it was composed of eleven members at the time its report and order was issued and an allegation that it was composed of nine members at that time.

The Swift Lumber Company also intervened.

No evidence was introduced before the District Court, except a certified copy of the record before the Commission. The court issued a temporary injunction which was later made perpetual, but rendered no opinion.

ASSIGNMENTS OF ERROR.

The United States, the Commission, and the Swift Lumber Company perfected a joint appeal and made general assignments of error to the effect that the District Court erred in issuing the injunction. (Rec. 181.)

ARGUMENT.

I.

THE COMMISSION'S PROCEDURE WAS REGULAR.

The contentions concerning alleged irregularities are apparently based on the following facts: The Commission did not adopt the conclusions proposed by the examiner; the oral argument was heard only by a division of the Commission; and the report of the Commission was concurred in by only five Commissioners.

The report proposed by the examiner was merely for the convenience of the parties and of the Commission and had no standing in law. The only report recognized by the statute is the report of the Commission. The Commission can, of course, either accept or reverse the examiner's findings. The division, in hearing oral argument, acted for the full Commission, and this is authorized by section 17 of the Interstate Commerce Act. It is clear that appellees were not prejudiced because the oral argument was before a division of the Commission instead of the full Commission. The case was briefed and furthermore the oral argument was transcribed, bound in the record with the evidence, and available to all the Commissioners.

The contention that the report was not adopted by a majority of the Commission is based upon the assumption that there were eleven members of the Commission on April 5, 1921, as alleged in the bill,

whereas, in fact, as alleged in the Commission's answer (Rec. 165) there were only nine members of the Commission at that time, there being two vacancies. It is the general rule that a decision by a majority of a tribunal holding office is valid, the only exceptions resulting from statutes. In this case, the general rule is supported by the statute, section 11 of the Interstate Commerce Act providing:

> No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

II.

THE SWIFT LUMBER COMPANY WAS NOT ESTOPPED FROM COMPLAINING OF THE RATES FROM KNOXO.

It is contended by appellees that the Commission was without jurisdiction to make an order on complaint of the Swift Lumber Company, because the Lumber Company was estopped from complaining of the rates from Knoxo, having agreed with the predecessor in interest of the Fernwood & Gulf, for a valuable consideration, to ship all of its lumber by that road under the established rate adjustment. But the only agreement by the Swift Lumber Company was to ship via the Fernwood & Gulf, nothing being said in the contract about the rates. (See Appendix A hereto.)

In passing, it might be said that if the railroad company gave valuable considerations to the lumber company and in return the lumber company agreed to ship its output over the line of the railroad com-

pany, with or without any understanding as to rates, the considerations passing to the lumber company amounted to a rebate and the agreement was void. *United States* v. *Union Stock Yard*, 226 U. S. 286. Moreover, no contract of this kind could work an estoppel against the Swift Lumber Company or deprive the Commission of its juridsiction. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433.

III.

THE COMMISSION'S ORDER DOES NOT REQUIRE ESTABLISHMENT OF CONFISCATORY RATES.

The Fernwood & Gulf claims that the Commission's order would result in confiscatory rates. It alleges that it is operating at a loss now; that lumber comprises some 93 per cent of its traffic; that in time the lumber on its line will be exhausted and there will be no traffic to take its place, and that it is therefore entitled to earn not only a fair return on its investment but a sum in addition to make good the alleged year-to-year depletion in the value of its property. It makes no further showing. We do not understand that the Illinois Central makes any claim of confiscation; certainly it makes no showing whatever to support such a claim.

This contention is based upon the erroneous assumption that compliance with the Commission's order would reduce the revenue of the Fernwood & Gulf. The order does not require the reduction of any rate. It does not fix rates, but merely the

adjustment of rates. It would be satisfied if the blanket rates, applicable from Fernwood, Tylertown, etc., were raised to the level of the rate applicable from Knoxo. Moreover, even if the order required the reduction of the Knoxo rate, this would not necessarily result in a reduction of revenue of the Fernwood & Gulf. That would depend upon the division of the new rate. The Fernwood & Gulf could come to the Commission to have just and reasonable divisions fixed. After that, and not before, conceivably, the question of confiscation might arise.

IV.

THE VALIDITY OF THE COMMISSION'S ORDER IS NOT TO BE TESTED BY THE POLICY OF THE RAILROADS.

The Illinois Central asserts that its policy has been not to extend blanket rates to points on independent short lines in this territory and that the Commission can not interfere with this policy. The Fernwood & Gulf takes a similar position, asserting that its policy has been not to join in rates on the blanket basis from points on its line.

But the validity of the Commission's order is not to be tested by the policy of the railroads. They are free to adhere to their policies only in so far as they are not in violation of the law.

In *Interstate Commerce Commission* v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88, 102, 103, the court said:

> The Commission was instituted to prevent discrimination between persons and places

and the outlook of the Commission and its powers must be greater than the interests of the railroads or of that which may affect those interests.

V.

THE FACTS JUSTIFY THE COMMISSION'S FINDING OF UNDUE PREJUDICE.

Whether the disadvantage to Knoxo amounts to undue prejudice is a question for the Commission and the court will not review the Commission's finding if it is supported by evidence. *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452 at 470; *Int. Comm. Comm.* v. *Del., L. & W. R. R. Co.*, 220 U. S. 235 at 251; *Int. Comm. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541 at 547; *Procter & Gamble* v. *United States*, 225 U. S. 282; *Atchison Ry. Co.* v. *United States*, 232 U. S. 199 at 220; *United States* v. *Louis. & Nash. R. R. Co.*, 235 U. S. 314 at 320; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457 at 481, 488; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 62; *O'Keefe* v. *United States*, 240 U. S. 249.

The facts stated hereinbefore, as to which there is no dispute, constitute ample evidence to support the Commission's finding.

Whether the prejudice is attributable in law to the appellees is the only question for review here. *Central Railroad of New Jersey* v. *United States*, 257 U. S. 247.

On this point appellees say, in Paragraph XV of their bill (Rec. 12):

> Complainants aver that said Commission was further without power to enter said order, coordinating the rates upon the independent short lines, with the rates existing upon the trunk lines, and their branches, because complainants say that none of said trunk lines reach Knoxo, Mississippi, and that the Fernwood Company is the only company therefrom moving yellow pine tonnage, and that said movement is at rates that are reasonable in and of themselves; * * * and complainants aver that it is not within the power of the Commission to coordinate the rates of one carrier to and with the rates of another and distinct carrier; nor is it within the power of the Commission to admeasure the rates to be charged by one carrier for services on its line with those upon other and differently situated lines, and compel each line, when the rates thereon charged are reasonable, to observe the rates promulgated by its competitors. * * *

As stated hereinbefore, the Fernwood & Gulf does participate in transportation from Fernwood, Foxworth, and Tylertown, under the blanket rates; that is, it participates in transportation under these rates from Fernwood, its junction with the Illinois Central, on traffic which does not move via the Illinois Central, but moves instead via the Fernwood & Gulf to one of its junctions with the New Orleans Great Northern and via the latter carrier beyond. So, also, as to transportation from Foxworth or Tylertown, its junctions with the New Orleans Great Northern, which does not move via the New Orleans

Great Northern but, instead, via the Fernwood & Gulf to Fernwood, and the Illinois Central beyond.

But the Commission's order would be valid in the absence of participation by the Fernwood & Gulf in such rates.

The question then presented is whether the Commission is precluded from finding the relationship between two rates unduly prejudicial when one or more carriers participate in the transportation under both rates, but another carrier participates in the transportation under one rate only.

For example: On lumber moving from the points taking the blanket rate the Illinois Central and its northern connections perform the entire transportation. On lumber moving from Knoxo to the same destinations the Fernwood & Gulf performs the transportation for 27 miles from Knoxo to Fernwood and the Illinois Central and its northern connections perform the transportation for hundreds of miles from Fernwood to destination.

The relationship which the Commission found unduly prejudicial to Knoxo was the relationship between the blanket rates and the rates from Knoxo to the same destinations. As pointed out above, the identical carriers which perform the transportation under the blanket rates perform all the transportation, several hundred miles, under the rates from Knoxo, except that 27 miles performed by the Fernwood & Gulf.

Is the Commission powerless to remove the prejudice simply because the Fernwood & Gulf, which

does not participate in the transportation under the blanket rates, does participate for an extremely short distance in the transportation from Fernwood?

This question has been before the Commission literally hundreds of times and the Commission has always held that it was not without power to remove a prejudice arising from the improper relationship of two rates, when one or more carriers were parties to both rates, simply because one of the carriers which participated in transportation under the one rate did not participate in transportation under the other rate.

Indiana Steel & Wire Co. v. *C., R. I. & P. Ry.*, 16 I. C. C. 155, decided in 1909, was one of the early cases in which the question arose. The Commission there found that rates from Kokomo and Muncie, Ind., to Arkansas common points were prejudicial as compared with the rates from Chicago to the same destinations. The only carriers which served Kokomo and Muncie did not participate in the transportation from Chicago; but to Arkansas points the traffic from Chicago and the traffic from Muncie and Kokomo moved over the same railroads west of the Mississippi River crossings.

In *R. R. Commission of Tennessee* v. *Ann Arbor R. R. Co.*, 17 I. C. C. 418, it was found that the rate on cotton from Jackson, Tenn., to New England mills was unduly prejudicial as compared with the rate on cotton from Brownsville, Tenn., to the same destinations. The Louisville & Nashville was the only road serving Brownsville, and it did not participate in the

transportation from Jackson. North of the Ohio River the transportation from Jackson and from Brownsville was over the same railroads. The Commission said at page 421:

> It is urged, further, that the line from Brownsville to destination is not the same as the line from * * * Jackson. But this is not a question under the fourth section, and therefore not a question of the same line. The inquiry is, Do these defendants by their joint rates unduly discriminate against Jackson in favor of Brownsville? In our opinion they do. This discrimination does not exist by virtue of the action of the Louisville & Nashville alone, but by reason of the united action of these different defendants. Without the consent of the lines north of the Ohio the discrimination would not exist, and it therefore lies within the power of those lines to stop it. If the Louisville & Nashville extended all the way from Brownsville to the delivering point, a different question would be presented. * * * we do not think that the fair intent of the act would permit the discrimination here existing in these rates between two localities but 25 miles apart, where the service for more than half the distance is by the same railroad. The Nashville, Chattanooga & St. Louis Railway extends from Jackson north to Paris, where it unites with the Louisville & Nashville. Cotton from Jackson passes 80 miles over the Nashville, Chattanooga & St. Louis and for the balance of the distance over the same line as that from Brownsville. Assume, now, that

> the Louisville & Nashville elected to maintain a rate of 70 cents from Brownsville, but the Nashville, Chattanooga & St. Louis, as the initial line, established a rate of 60 cents from Jackson. Could it be said that this road which hauls the traffic but 80 miles out of a total distance of 1,306 miles is entitled to create and perpetuate that rate condition? We think not. * * *.

In *Chamber of Commerce of Newport News* v. *S. Ry. Co.*, 23 I. C. C. 345, it was found that rates from southeastern freight association territory to Newport News were unduly prejudicial as compared with rates from the same points to Norfolk. The Commission said, at page 352:

> The Southern, Coast Line, Seaboard, and Norfolk & Western contend that their lines do not serve Newport News, and for that reason they can not be held responsible for any discrimination that may exist against Newport News. While it is true that none of their lines actually reaches Newport News, nevertheless, they all participate in Newport News traffic to and from the south by way of Norfolk or through connections with the Chesapeake & Ohio at Richmond.
>
> * * * * *
>
> The southern carriers participate actively in Newport News traffic to and from the south and southwest, and they practically control the rates between Newport News and points within association territories. The fact that their rails do not extend to Newport News can not relieve them from responsibility for the

effect of rates which they control and in which they participate. *R. R. Com. of Tenn.* v. *A. A. R. R. Co.*, 17 I. C. C. 418; *Indiana Steel & Wire Co.* v. *C., R. I. & P. Ry. Co.*, 16 I. C. C. 155; *Chamber of Commerce of Ashburn, Ga.*, v. *G. S. & F. Ry. Co.*, 23 I. C. C. 140.

The Commission's order was upheld by the Commerce Court, *Southern Ry. Co.* v. *United States*, 204 Fed. 465.

It will be observed that each of these cases involved a situation where one or more carriers participated in transportation under one rate in the improper adjustment, but not in transportation under the other rate, and where one or more other carriers participated in the transportation under both rates. Other cases in which the Commission followed the same rule are very numerous and include the following:

Elk Cement & Lime Co. v. *B. & O. R. R. Co.*, 22 I. C. C. 84, 89.

Greenbaum Co. v. *C. & O. Ry. Co.*, 25 I. C. C. 352, 355.

Rates from Walsenberg Coal Field, 26 I. C. C. 85, 89.

Partridge & Sons Co. v. *P. R. R. Co.*, 26 I. C. C. 484, 486.

La Grange Chamber of Commerce v. *A. & W. P. R. R. Co.*, 28 I. C. C. 178, 184.

Sheridan Chamber of Commerce v. *C., B. & Q. R. R. Co.*, 28 I. C. C. 250, 258.

Greenbaum Co. v. *L. & N. R. R. Co.*, 31 I. C. C. 699, 707.

Rates on Lumber from Southern Points, 34 I. C. C. 652, 671.

There is no support in *Central R. R. Co. of New Jersey* v. *United States*, 257 U. S. 247, for appellee's contention that there can be no prejudice because the Fernwood & Gulf does not participate in transportation under the blanket rates. That case is essentially different from this case. There the facts were as follows: Joint through rates were published on forest products from points in the south to points north and east of Newark, N. J. Shipments moving under these rates passed over the lines of several different carriers. At certain points in the south, on the route of movement under these rates, the southern carriers granted a creosoting-in-transit privilege.[1] The Pennsylvania Railroad and the Jersey Central Railroad refused to grant a similar privilege at Newark. Upon a complaint naming the Pennsylvania, the Jersey Central, and certain other carriers as respondents, but failing to include as respondents the railroads which granted the transit privileges in the south, the Commission found that the failure to grant the privilege at Newark while it was being granted at the southern points constituted a prejudice against Newark.

This court held that the Commission's order was void, because a transit privilege is a matter local to

[1] The court described the privilege on page 254 as follows:

"By the privilege called creosoting in transit forest products received for shipment may be stopped and unloaded at an intermediate point, there subjected to the process of creosoting, and later forwarded on the original bill of lading to the destination therein named."

the railroad on which the transit point is located, saying:

> * * * Under the rules of the Commission governing the making, filing, and publishing of tariffs, privileges like creosoting in transit are treated as a matter local to the railroad on which the transit point is situated. Whether the privilege shall be granted or withheld is determined by the local carrier. If granted, the local carrier determines the conditions; and these are set forth in the local tariff. * * *

It follows that the Pennsylvania and the Jersey Central, which refused the privilege at Newark, were not responsible for the action of the southern carriers in granting the privilege at points on their lines and the southern lines were not accountable for the failure of the Pennsylvania and Jersey Central to grant the privilege at Newark.

A prejudice results from a relationship between two rates or practices. In the *Jersey Central case* no one carrier was in whole or in part responsible for both practices, the relationship of which was found by the Commission to result in prejudice.

In this case the prejudice results from the relationship between two rates, first, the blanket rate and, second, the rate from Knoxo. The Illinois Central and its northern connections participate in both of these rates.

The question here is whether the Fernwood & Gulf can, as a legal right, obstruct the Commission's

effort to remedy the prejudice, particularly when it can not show, as we will point out, that to do so would decrease its revenue or otherwise injuriously affect its interests.

As a matter of fact, the other carriers could, as before explained, comply with the Commission's order without the consent of the Fernwood & Gulf by raising the blanket rates to the level of the Knoxo rate, or by establishing proportional rates from Fernwood on lumber originating at Knoxo which, when added to the local rates of the Fernwood & Gulf, would produce combination through rates equal to the blanket rates. The consent, either voluntary or enforced, of the Fernwood & Gulf, would be necessary if the Commission's order were to be complied with by publishing joint rates from points on its line no higher than the blanket rates. Even if this last method were adopted, there is no reason to believe that the Fernwood & Gulf would receive less revenue than it obtains as its divisions of the existing joint rates. This would depend upon its divisions, of the new rates, which the Commission has the power to fix. In fixing those divisions, no doubt the Commission could consider that the blanket rates from Knoxo, lower than the rates which the Commission has found are not unreasonable, were primarily the result of the action of the Illinois Central and its northern connections in maintaining the blanket rates from other points.

We have tried to show that the *Jersey Central case* is not controlling here. In this connection, it is noteworthy that the court, in that case, referred with approval to *St. Louis-S. W. Ry. Co.* v. *United States*, 245 U. S. 136, the so-called *Paducah case*, which, in so far as it involved section 3, is almost exactly like the case at bar. There, an order of the Commission, based upon a finding that the lumber rates from the southwest to Paducah were unreasonable and unduly prejudicial as compared to the rates to Cairo, was under review. Paducah is situated on the south bank of the Ohio River, 42 miles above Cairo, Ill. Each city is a manufacturing and jobbing center for lumber and draws its lumber in part from the extensive region lying west of the Mississippi River and south of the Arkansas River, known as the "blanket territory." The principal railroads serving this blanket territory were the St. Louis-Southwestern, St. Louis, Iron Mountain & Southern, and Chicago, Rock Island & Pacific. The first two had their own lines from the blanket territory to Cairo and could reach Paducah only over a connecting line. The Rock Island reached both Cairo and Paducah only over a connecting line. The Rock Island had established a route via Memphis, but the other two companies had through routes to Paducah only via Cairo. From Cairo to Paducah transportation was over the Illinois Central. As to the Memphis route, transportation from Memphis was via the Illinois Central. The rate to Cairo was

16 cents, and the rate to Paducah via Cairo a combination rate made up of the 16-cent local rate to Cairo plus the 6-cent local rate from Cairo to Paducah. The Commission found that: 1. The 22-cent rate to Paducah was unreasonable in that it exceeded the existing rate to Cairo; 2. That the existing disparity of rates gave to Cairo an undue preference and advantage over Paducah; 3. That through routes and joint rates no higher than Cairo rates should be established to Paducah via either Memphis or Cairo.

The carrier connecting at Cairo (the Illinois Central) acquiesced in the order establishing the joint rate.

The court upheld the Commission's order and said at page 144:

> The carriers insist also, that the order is void on the ground that since their "rails do not reach Paducah they can not be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reach Paducah, although not on their own rails, and thereby they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly, the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is

> not confined to those whose rails enter it. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission, supra*, 162 U. S. 184.

The court said further at page 143:

> If these complaining carriers can not reach satisfactory agreements with the Illinois Central as to what its share of the 16-cent rate should be, they may, under section 15 of the act to regulate commerce, apply to the Commission for an appropriate order. In respect to the Rock Island the situation is similar.

It is true that in the *Paducah case* there was a finding of unreasonableness as well as a finding of prejudice, the court saying, at pages 144, 145:

> * * * the order in the case at bar is not merely one to prevent discrimination. * * * It is not primarily an order to remove discrimination in violation of section 3.

Nevertheless, the discussion in the opinion indicates clearly that the order was sustainable on grounds of discrimination, regardless of other grounds.

The case at bar is similar to the *Paducah case*. In this case the Illinois Central and its northern connections occupy the same position that the Iron Mountain, St. Louis-Southwestern, and the Rock Island occupied in the *Paducah case;* that is to say, they participate in two rates, the relationship of which is unlawful. And the Fernwood & Gulf in this case stands in the position of the Illinois Central

in the *Paducah case;* that is to say, it is a party to the transportation under one of the rates but not to transportation under the other. It participates in the transportation from Knoxo but not in the transportation from Fernwood, etc., as the Illinois Central participated in the transportation to Paducah but not in the transportation to Cairo. In the *Paducah case* the Illinois Central did not protest the order as the Fernwood & Gulf is protesting in this case, but the failure of the Illinois Central to protest could not empower the Commission to make a finding of prejudice if, as a matter of law, no prejudice existed.

Before leaving this question we should point out that if the Commission can not remedy a rate situation such as that here presented by a finding of prejudice under section 3, it can not satisfactorily reach it at all.

It may be suggested that the Commission has ample power to properly adjust the rates by findings of unreasonableness under section 1 and by fixing maximum or minimum rates or both. But such a course would present serious difficulties. The rate from Knoxo, standing by itself, is not unreasonably high or otherwise unlawful; the blanket rate, standing by itself, is not unreasonably low or otherwise unlawful. The real evil is the relationship between these rates, and the only way of striking *directly* at this relationship is by a finding of prejudice.

Would the Commission be justified in attempting to cure the evil *indirectly* by findings of unreason-

ableness? The distinction between a finding of unreasonableness and a finding of prejudice is of great practical importance, and this is at once manifest when we consider that the rule respecting reparation in the case of a finding of unreasonableness is different from that applicable in the case of a finding of prejudice.

A shipper who pays an unreasonable rate is entitled to recover the excess between that rate and a reasonable rate without further showing of damage. The fact that he may have passed on the damage to the purchasers of the goods or to others is immaterial. *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531. On the other hand, the fact that a shipper has paid a rate which was unduly prejudicial to him when compared with the rate paid by another shipper, is not of itself sufficient to support an award of reparation. He is entitled to a recovery only if he can show actual pecuniary loss. *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184.

In view of this distinction as to reparation, it would seem that the Commission should carefully avoid findings of unreasonableness when the real evil is merely a prejudicial rate adjustment. Complainant in this case showed no pecuniary loss as a result of the rate prejudice and reparation was accordingly denied. If the Commission had found the rate from Knoxo unreasonably high, complainant would have been entitled to reparation down to the basis of the rate found reasonable.

CONCLUSION.

The relative adjustment of rates is generally of greater importance to shippers than the level of rates. The chief purpose of the regulation of interstate carriers was to do away with discrimination between persons and places. Regulatory legislation was based on the theory that "the paramount evil chargeable against the operation of the transportation system of the United States" was such discrimination. In *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 356, speaking of section 3, this court said:

> This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn.
>
> * * * * *
>
> It is apparent from the legislative history of the Act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory act or practice of interstate carriers affecting interstate commerce which it had authority to reach. The purpose of the measure was thus emphatically stated in the elaborate report of the Senate Committee on Interstate Commerce which accompanied it.
>
> "The provisions of the Bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now con-

ducted, is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations * * *." (Senate Report No. 46, 49th Cong., first sess., p. 215.)

The situation before the Commission presented a typical instance of discrimination between persons and localities. The evil could be directly remedied only by a finding of undue prejudice under section 3. It could not be satisfactorily remedied by findings of unreasonableness under section 1.

The Illinois Central and its northern connections participated in the transportation under both rates, the relationship of which was improper. The Fernwood & Gulf participated in the transportation under one rate but not under the other. This carrier should not be permitted to obstruct the removal of the maladjustment, particularly when it is not in a position to show that compliance with the Commission's order would reduce its revenue or otherwise injuriously affect its interests.

J. CARTER FORT,
Solicitor for the
Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

OCTOBER, 1923.

Appendix A.

State of Mississippi,
County of Marion:

For and in consideration of the sum of one dollar ($1.00), cash in hand paid, the receipt whereof is hereby acknowledged, and certain conditions as hereinafter recited, the Fernwood Lumber Company herein acting by and through the Secretary thereof, doth lease unto the Swift Lumber Company, their successors or assigns, for such a length of time as they continue the manufacture and shipping of lumber from their present mill site at Knoxo, Miss., or approximately seven (7) years, a right of way twenty-five (25) feet wide, being twelve and one-half (12½) feet on either side of the center of their logging railroad as now established, and to be established, by grade stakes on, over, and across the following lands in said County and State, more particularly described as follows:

Beginning on the SW. ¼ of NW. ¼, Section 18, Twp. 2, R. 12, where departure is made from the Fernwood & Gulf Railroad; thence in a southeasterly direction on, over, across said SW. ¼ of NW. ¼, SW. ¼, and S. ½ of SE. ¼, Section Eighteen (18), SW. ¼ of SW. ¼ and N. ½ of SE. ¼ of SW. ¼, Section Seventeen (17); SW. ¼ of SW. ¼, Section Sixteen (16); S. ½ of NE. ¼ and SE. ¼, Section Twenty-one (21), and NE. ¼, Section Twenty-eight (28), all in Twp. 2 N., R. 12 East, County and State aforesaid.

The conditions heretofore referred to are: That Swift Lumber Company, their successors or assigns, shall deliver to the Fernwood & Gulf Railroad Company all and singular the freight tonnage originating on or tributary to the logging railroad of the Swift

Lumber Company that may be offered and destined to a point beyond said logging railroad or any extensions thereof.

It is understood that the Fernwood Lumber Company hereby reserve the right for such crossings over the logging railroad of the Swift Lumber Company as they may require for their logging railroad, branches or spurs, and that the expense incident to installing these crossings shall be borne by the Swift Lumber Company.

It is also agreed that the Swift Lumber Company will provide at its own cost satisfactory crossings for all logging teams as well as turpentine teams at such points on its line as shall be designated by the Fernwood Lumber Company, or its Superintendents of its respective departments.

It is also agreed that the Swift Lumber Company will use every precaution against damage by fire to the naval stores and timber properties of the Fernwood Lumber Company and be liable for any damage traceable to their use of said right of way and save the Fernwood Lumber Company from loss or damage on account of acts of theirs or their employees.

In testimony whereof witness the signature of the Secretary of said Company, together with the seal of said Company hereto attached, this the 14th day of March, A. D. 1912.

FERNWOOD LUMBER COMPANY,
——— ———, *Secretary.*

Accepted.

SWIFT LUMBER COMPANY,
By ——— ———.

(Interstate Commerce Commission. Docket No. 10827. Exhibit No. 8. Witness Kimball.)

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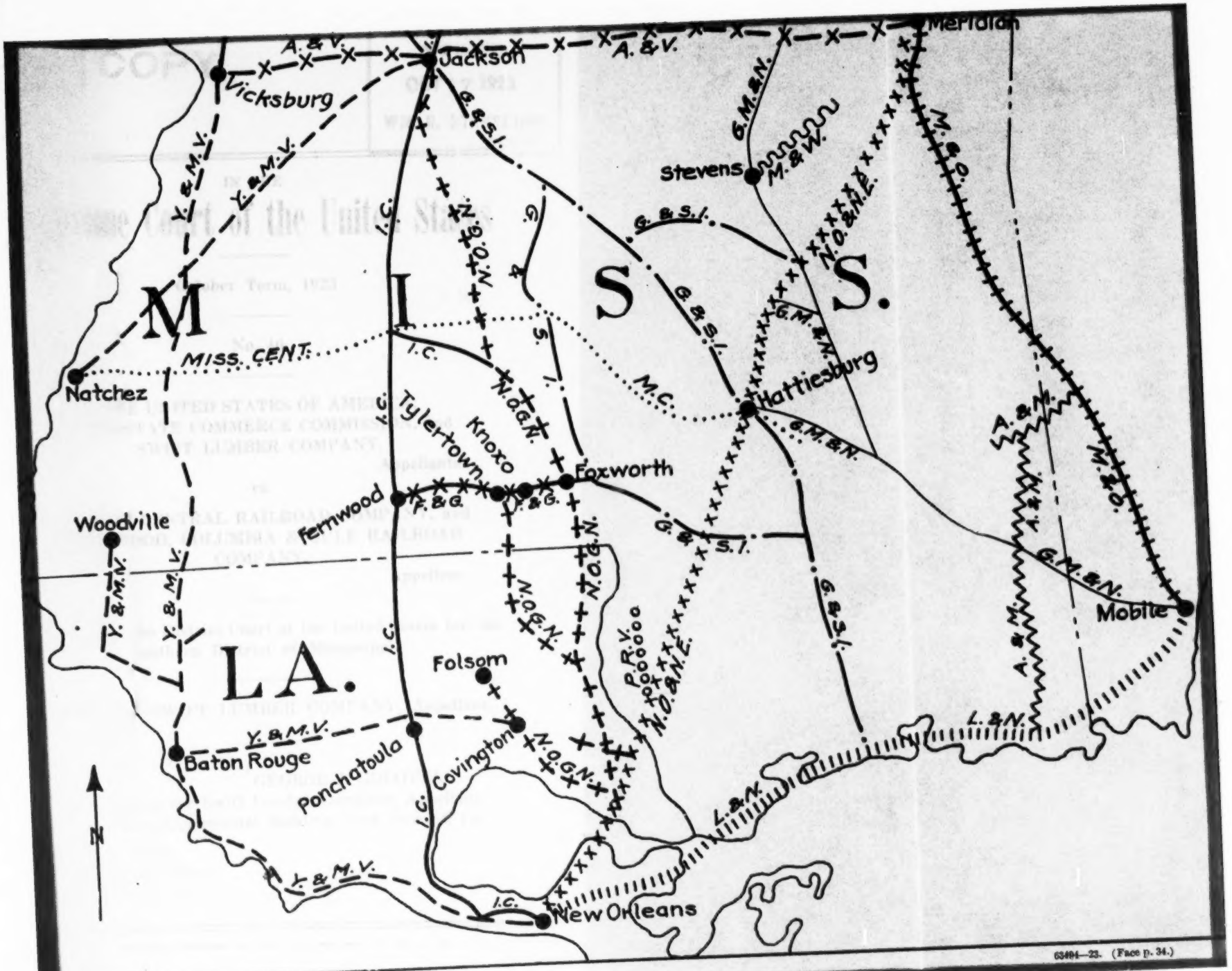

63494—23. (Face p. 34.)